Summary of Commission Decision

of 30 January 2020

relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area

(Case AT.40433 – Film merchandise)

(notified under document C(2020) 359)

(Only the English text is authentic)

(Text with EEA relevance)

(2020/C 133/08)

On 30 January 2020, the Commission adopted a decision relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 ([1]), the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.

1. INTRODUCTION

(1) The decision is addressed to Comcast Corporation and its subsidiaries NBCUniversal LLC, NBCUniversal Media LLC, Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC, Dreamworks Animation Licensing LLC and Universal Pictures (Shanghai) Trading Company Limited (hereinafter 'Universal'), for infringing Article 101 of the Treaty on the Functioning of the European Union (the 'Treaty') and Article 53 of the Agreement on the European Economic Area ('EEA Agreement').

(2) Among others, Universal licenses its film-related intellectual property rights – including its well-known film series the Minions and Jurassic World – to third parties for the production and distribution of branded merchandise. Between 1 January 2013 and 25 September 2019, Universal participated in a single and continuous infringement that involved the implementation and enforcement within the EEA of a series of practices restricting active, passive and online sales of licensed merchandise across territories and customer groups.

2. CASE DESCRIPTION

2.1. The products concerned

(3) The decision concerns Universal's activities as a licensor for its film properties. Universal licenses its films to other undertakings that produce and distribute various merchandising products including licensed intellectual property rights from Universal's films. The decision concerns products of a varied nature, for example clothes, toys, gifts and accessories, often referred to as licensed merchandise products. Universal's licensed merchandise contributes to the promotion of the film to which the intellectual property relates.

(4) Universal typically licenses its proprietary films either directly or through an agent. Regardless of the system used for the granting of licences, agreements with the licensee also typically include provisions governing the distribution of the products on which the licensed intellectual property right will be applied. Elements consistently present in Universal's license merchandising agreements include:

(a) *Territorial scope:* Universal generally grants licences in the EEA on a non-exclusive basis for one or more specific countries, although in practice there is generally limited overlap between the products and the territories in licensees' agreements;

(b) *Channels for distribution of the products:* Universal's non-exclusive merchandising licence agreements typically include a list of distribution channels through which the licensee may distribute the products, at times defined as narrowly as limiting distribution to specific customers or customer groups; in practice there is generally limited overlap between the products and the channels for distribution in licensees' agreements;

([1]) OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

(c) *Financial compensation to be paid by the licensee:* Universal's licensing agreements provide for licensees to pay Universal a certain amount in consideration for the grant of the licence for the intellectual property rights.

(5) These license merchandising agreements, and more broadly, the relationships that are built on the basis of those agreements, are the focus of the decision.

2.2. **Procedure**

(6) In September 2016, the Commission sent a request for information to Universal.

(7) By decision of 14 June 2017, the Commission initiated proceedings against Comcast Corporation and its subsidiaries, including NBCUniversal Media LLC. The purpose of the initiation of proceedings was to investigate whether Universal had in place agreements and/or applied practices preventing or restricting the sale of licensed merchandise in the EEA. On 29 November 2019, the Commission adopted a further decision to initiate proceedings in accordance with Article 2(1) of Commission Regulation (EC) No 773/2004 against eight other subsidiaries of Comcast Corporation.

(8) On 25 September 2018 the Commission conducted unannounced inspections at NBCUniversal Media LLC offices in London, United Kingdom.

(9) On 13 November 2019, Universal submitted a formal offer to cooperate in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 (the 'settlement submission').

(10) On 29 November 2019, the Commission adopted a Statement of Objections addressed to Universal. On 16 December 2019, Universal submitted its reply to the Statement of Objections.

(11) The Advisory committee on Restrictive Practices and Dominant Positions issued a favourable opinion on 23 January 2020.

(12) The Hearing Officer issued his final report on the case on 24 January 2020.

(13) The Commission adopted this decision on 30 January 2020.

2.3. **Summary of the infringement**

(14) A series of practices restricting active and passive sales of licensed merchandise across territories and customer groups were put in place throughout Universal's merchandising business. These practices concerned both offline and online sales of licensed merchandise products throughout the EEA. The following main types of restrictions are covered by the decision:

(a) *Direct measures restricting sales by licensees,* such as (i) prohibition of out-of-territory passive sales; (ii) prohibition of out-of-territory active sales; (iii) prohibition of online sales; (iv) obligation to notify Universal of out-of-territory sales; (v) use of language requirements to restrict out-of-territory sales; (vi) prohibition of sales outside of allocated customer groups; (vii) obligations to pay to Universal revenues generated from sales beyond the allocated territories and customer groups.

(b) *Indirect measures restricting sales by licensees*: a series of measures were also at times implemented as an indirect way to encourage compliance with the restrictions to sales beyond the allocated territories and customer groups. These measures included the conduct of audits and the non-renewal of contracts.

(c) *Obligation to pass on the sale restrictions,* in order to guarantee that any third party selling Universal's licensed merchandise would also comply with the territorial and customer restrictions.

(15) Through this set of practices, Universal restricted licensees' ability to sell licensed merchandise across territories and customer groups. This single and continuous infringement might have led to a reduction in the choice available for consumers and to increased prices deriving from the lower level of competition. This conduct constitutes, by its very nature, a restriction of competition by object within the meaning of Article 101(1) of the Treaty.

(16) The decision also finds that the conduct does not meet the conditions for exemption provided for in Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement.

2.4. **Addressees and duration**

(17) The decision is addressed to Comcast Corporation, NBCUniversal LLC and NBCUniversal Media LLC as parent companies, as well as to certain of their subsidiaries involved in the licensed merchandise business in the EEA: Universal Studios Licensing LLC, Universal Studios Limited, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC, DreamWorks Animation Licensing LLC and Universal Pictures (Shanghai) Trading Company Limited.

(18) The duration of the infringement spans from 1 January 2013 to 25 September 2019, the date when Universal sent letters informing all its licensees that those sales restrictions in its agreements ceased to apply in the EEA.

2.5. **Remedies and fines**

(19) The decision finds that Universal brought the infringement to an end on 25 September 2019 and requires Universal to refrain from any agreement or concerted practice which might have the same or a similar object or effect. The Commission also considers that the infringement was committed intentionally, and if not, at least negligently, and that a fine needs to be imposed.

2.5.1. *Basic amount of the fine*

(20) For the purposes of calculating the fine, the decision uses the amount of royalties collected by Universal during the last full year of the infringement (2018). The value of sales is based on the royalties received by Universal from its licensees for sales of licensed merchandise products in the EEA. These royalties represent Universal's revenues from its licensed merchandise business and are paid to Universal in exchange for the use of the licensed intellectual property rights.

(21) Sales restrictions beyond allocated territories and customer groups, by their very nature, restrict competition within the meaning of Article 101(1) of the Treaty. However, vertical restraints are generally less harmful than horizontal ones. The 'gravity percentage' is set at 8 % of Universal's value of sales.

2.5.2. *Aggravating or mitigating circumstances*

(22) There are no aggravating or mitigating circumstances in this case.

2.5.3. *Deterrence*

(23) The Commission does not apply a deterrence multiplier because it is not warranted in this case.

2.5.4. *Application of the 10 % turnover limit*

(24) The calculated fine does not exceed 10 % of Comcast Corporation's total worldwide turnover.

2.5.5. *Reduction of the fine in view of cooperation*

(25) In exchange for Universal's cooperation the decision grants a 30 % reduction on the fine pursuant to point 37 of the Guidelines on Fines. Ever since formally engaging in cooperation, Universal cooperated with the Commission beyond its legal obligation to do so by acknowledging the infringement, as well as by providing additional evidence to the Commission, thereby strengthening to a certain extent its ability to prove the infringement, and waiving certain procedural rights resulting in administrative efficiencies.

3. **CONCLUSION**

(26) Universal infringed Article 101(1) of the Treaty and Article 53 of the EEA Agreement by participating in a single and continuous infringement regarding licensed merchandise. The infringement covered the whole of the European Economic Area, and consisted in the implementation and enforcement of a series of agreements and practices aimed at restricting sales of licensed merchandise across territories and customer groups, both offline and online.

(27) The final amount of the fine to be imposed on Universal pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 should be EUR 14 327 000.

(28) Comcast Corporation, NBCUniversal LLC, NBCUniversal Media LLC and Universal Studios Licensing LLC should be held liable for the total amount of this fine, while Universal Studios Limited should only be held liable for the period starting on 6 June 2014, the date of its incorporation, DreamWorks Animation UK Limited, DreamWorks Animation Publishing LLC, DreamWorks Animation LLC and DreamWorks Animation Licensing LLC for the period starting on 22 August 2016, on which they were acquired by Comcast Corporation and Universal Pictures (Shanghai) Trading Company Limited for the period starting on 21 October 2016, on which it was incorporated.